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Docket No

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1997

ROBERT J. GALIETTE

*Petitioner,*

v.

STATE OF CONNECTICUT

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court**
**For The State of Connecticut**

## PETITION FOR WRIT OF CERTIORARI

ROBERT J. GALIETTE
*(Counsel of Record)*
Robert J. Galiette, Attorney At Law
3 Teal Lane
Essex, Connecticut 06426-1046
Telephone: (860) 767-0503
Facsimile: (860) 767-0508
*Counsel for Petitioner*

December 20, 1997

47pp

## QUESTIONS PRESENTED

(I.) Do Connecticut's mechanic's lien statutes deny **procedural due process** protection under the **Fourteenth Amendment of the U.S. Constitution** in that they permit a lienor to place on real property a mechanic's lien (1) without a contract, (2) without judicial involvement, and (3) without a bond, and then preclude any remedy in damages for resulting harm if the lien is invalid but the lienor claims that it was brought with just cause?

(II.) Do Connecticut's mechanic's lien statutes constitute a taking of property and a defect in due process under **procedural due process** requirements of the **Fourteenth Amendment of the U.S. Constitution** by failing to provide for a prompt hearing in discharge, to determine whether probable cause exists to uphold a lien on real property, if the lienor also commences a foreclosure action on the property at the same time?

(III.) Under **procedural due process** standards of the **Fourteenth Amendment of the U.S. Constitution,** if an invalid mechanic's lien affects a homeowner's ability to obtain title insurance from an insurer, or construction mortgage financing from a bank, does the lien result in depriving the owner of a property right, or do nothing more than impinge upon economic interests of the property owner?

(IV.) Do **procedural due process** standards of the **Fourteenth Amendment of the U.S. Constitution**, which require a lienor to provide a bond or to show that exigent circumstances exist in order to initiate an attachment of personal property without a pre-attachment hearing, apply in the same way to the placement of liens and attachments on real property?

## PARTIES TO THE PROCEEDING

Under Rule 14 of the Rules of the Supreme Court of the United States, parties to the proceeding in the Supreme Court for the State of Connecticut, whose judgment is sought to be reviewed, were property owners / defendants Robert J. Galiette and Sandra H. Galiette.

Lienor / plaintiff was the construction firm Richard Riggio & Sons, Inc., a Connecticut corporation with whom a stipulation ending further participation in proceedings was entered by consent on December 8, 1997.

As in the collateral case *Connecticut v. Doehr*, 501 U.S. 1 (1991), the State of Connecticut is a necessary party to the issues addressed in this Petition, either by joinder under Federal Rules of Civil Procedure Rule 19, or by intervention, under Federal Rules of Civil Procedure Rule 24, because in such party's absence complete relief cannot be accorded among those already party, and the interests under petition for review here relate directly and explicitly to the constitutionality of attachments and liens on real property under Connecticut's mechanic's lien statutes, and the requirements imposed on them under procedural due process standards of the Fourteenth Amendment of the U.S. Constitution.

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Robert J. Galiette was admitted as an Attorney and Counsellor of the Supreme Court of the United States on December 3, 1984.

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## PETITION FOR WRIT OF CERTIORARI

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## OPINIONS BELOW

The initial April 17, 1996 Memorandum of Decision (Hon. Daniel F. Spallone, judge trial referee) was not reported. The opinion of the State of Connecticut Appellate Court, which affirmed the judgment of the judge trial referee, is reported at 46 Conn. App. 63 (1997). The State of Connecticut Supreme Court issued an Order, 243 Conn. 920 (1997), on September 24, 1997 denying the defendants' petition for certification for appeal from the Appellate Court.

## JURISDICTION

The judgment of the State of Connecticut Supreme Court was entered on September 24, 1997. No petition for rehearing was made. There are no cross-petitions under U.S. Supreme Court Rule 12.5. Jurisdiction to review on a writ of certiorari the judgment or order in question is conferred on this Court by 28 U.S.C. § 1257(a), because a final judgment or decree has been rendered by the highest court of a State in which a decision could be had, and the validity of a statute of a State is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Notification required by Rules of the Supreme Court of the United States Rule 29.4(c) has been made. As required by that Rule, this Petition also has been sent to the Attorney General of the State of Connecticut with a notice under 28 U.S.C. § 2403(b).

## STATUTES INVOLVED

The State of Connecticut Supreme Court in *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, 168 Conn. 371 (1975), held that Connecticut's mechanic's lien statutes were unconstitutional based on U.S. Supreme Court procedural due process decisions being handed down at that time. Following *Roundhouse*, the State of Connecticut's Legislature, the General Assembly, immediately enacted amendments to Connecticut General Statutes (C.G.S.), two of which add to the State's mechanic's lien statutes at C.G.S. § 49-35 and are relevant here: C.G.S. §§ 49-35a(a) and 49-51(a).

**(1) C.G.S. § 49-35a(a) Preclusion of the right to a post-attachment hearing under Connecticut's mechanic's lien statutes whenever a lienor commences a foreclosure action at the same time that the lien is pending.**

Among the amendments to Connecticut statutes following *Roundhouse* was the creation in 1975 by Connecticut Public Act 75-418, *An Act Concerning Mechanic's Liens*, of new sections C.G.S. §§ 49-35a through 49-35d.

The time within which a mechanic's lien could be filed was changed from within sixty days to within ninety days of when materials or services were last supplied by the lienor. No amendments were added to correct other procedural deficiencies cited by the Connecticut Supreme Court, such as the ability of the lienor to place a lien on real property (1) without a contract, (2) without judicial involvement, and (3) without a bond. The time period within which a lienor could foreclose on a lien after initiating it was reduced from two years to one year.

Of particular relevance in this Petition is C.G.S. § 49-35a(a), which was added in 1975 by Connecticut Public Act 75-418, and which begins in pertinent part:

> Whenever one or more mechanics' liens are placed upon any real estate pursuant to sections 49-33, 49-34, 49-35 and 49-38, the owner of the real estate, if no action to foreclose is then pending before any court, may make application, together with a proposed order and summons, to the superior court for the judicial district in which the lien may be foreclosed under the provisions of section 52-19*, or to any judge thereof, that a hearing or hearings be held to determine whether the lien or liens should be discharged or reduced. (*underlining added*) **C.G.S. § 52-19 is now C.G.S. § 51-345*

**(2) C.G.S. §§ 49-51(a) Preclusion of Damages under Connecticut statutes for an invalid mechanic's lien based on a standard of "just cause".**

Also of relevance in this Petition is C.G.S. § 49-51(a), which was added in 1982 by Connecticut Public Act 82-270, *An Act Concerning the Discharge of Invalid Real Estate Liens*. The Connecticut General Assembly continued to have concerns that if Connecticut statutes failed to provide safeguards of (1) a contract, (2) judicial involvement or (3) a bond at the front end of the process of placing a mechanic's lien on real property, and if judicial review of the validity of the lien could be deferred for several years whenever a pending foreclosure action on the lien is commenced at the same time, then some provision for compulsory damages should be attached at the end of the process if the lien ultimately is found to be invalid. Otherwise a lien would remain unilaterally and without consequence under the tactical control of the lienor, and a property owner would be denied due process and equal protection under the law.

Legislative guidance for members of the Connecticut General Assembly came from U.S. Supreme Court decisions on the subject of procedural due process requirements of the Fourteenth Amendment of the U.S. Constitution.

Legislative sponsors of Public Act 82-270 entered into the official record of Connecticut *Senate Proceedings* the following intent of the introduced amendment:

> The bill would permit a court which finds that lien was filed without just cause to allow, instead of actual damages, the larger of the following two amounts: $100.00 a week for each week after the thirty day notice period expires or actual damage plus a reasonable attorney's fees. *State of Connecticut General Assembly Senate Proceedings, Wednesday, April 28, 1982, pages 3275 and 3276.*

Accordingly, the actual language of Conn. Public Act 82-270 added the following sentence to Connecticut General Statutes § 49-51(a):

> If the court is of the opinion that such certificate of lien was filed without just cause, it may allow, in its discretion, damages to any person aggrieved by such failure to discharge, at the rate of one hundred dollars for each week after the expiration of such thirty days, but not exceeding in the whole the sum of five thousand dollars or an amount equal to the loss sustained by such aggrieved person as a result of such failure to discharge the lien, which loss shall include, but not be limited to, a reasonable attorney's fee, whichever is greater.

However, despite the fact that mechanics' liens are real property attachments created by statute, and not actions under common law, Connecticut Courts hold that under C.G.S. § 49-51(a) an invalid lien can be filed **with** just cause. Based on this prevailing interpretation of the statute in Connecticut, no damages are allowed for an invalid mechanic's lien when a lienor claims to have had "just cause".

## STATEMENT OF THE CASE

### A. The Facts

This case presents facts which deal solely with procedural due process issues associated with attachments of real property. The facts relate to the construction of a new home, and problems under Connecticut statutes resulting from the inability to obtain a post-attachment hearing, or to obtain damages as the result of an invalid mechanic's lien.

In the present case, Petitioner Galiette and his wife contracted with construction contractor Richard Riggio & Sons, Inc. (hereinafter the "Builder"), a company owned by a former First Selectman of Essex, Connecticut, to construct a foundation and exterior wood framing for a home. After a year on Petitioner's property, the Builder had received from Petitioner payments and advances reflecting nearly two-thirds of its contract, but since March 1990 had proceeded no further than completion of only a house foundation surrounded by some fill. Builder last undertook construction on January 4, 1991. Petitioner discharged Builder from further work on February 27, 1991. The following evidence was presented at trial.

The foundation and fill portion of Builder's contract was for $40,103. Remaining exterior framing and roofing was contracted at an additional $84,454, for a combined total of $124,557. The eight-room house is 37 feet by 55 feet; the attached garage is 27 feet by 36 feet. The house exists today in the same dimensions as drawn on blueprints before Petitioner met Builder, and before Builder commenced work, with the exception that two flanking garage and breezeway foundations were consolidated into one, with an associated saving of concrete.

Builder executed no change orders to its contract. Builder had received $81,080 in payments and advances at the time of discharge and executed a waiver of mechanic's lien, which Builder mailed to Petitioner under postmark of March 2, 1991, three days after Builder's discharge.

When Petitioner thereafter hired another contractor to complete the unfinished home framing, Builder complained about its discharge to the Town of Essex Building Inspector, who thereupon imposed on the continuation of construction certain new conditions. These conditions included

requirements later described in a report by the State of Connecticut Building Inspector as fictitious, such as a requirement to obtain a "release" from Builder stating that Builder had been paid to its full satisfaction and had no liens on the property. Without this "release" the Essex Building Inspector threatened to remove the building permit from the project and prevent any further construction from continuing.

Builder requested an additional payment of $11,576 from Petitioner in order to provide the requested "release". Petitioner offered to pay Builder this additional amount to avoid a removal of the existing building permit by the Essex Building Inspector. However, Builder requested a second payment of another $15,968 for what Builder described as its "lost profits". When the second amount was not offered, the Essex Building Inspector, who is also the Essex Town Constable, placed a Stop Work Order on the property and threatened to arrest any subsequent contractor who worked on the property. The State of Connecticut Building Inspector's office subsequently intervened to prevent fictitious building code requirements from continuing to be imposed on the property in connection with such payment requests. Builder thereupon employed the Town Attorney of Essex to place a lien on Defendant's unfinished home on April 22, 1991.

As a result of these actions Petitioner's bank, which provided construction financing, abandoned further funding needed to complete construction. Replacement financing, and associated title insurance required by lending banks as a condition for obtaining mortgage financing, became almost unobtainable, or obtainable only at a high price.

Subsequent banks and title insurers would not accept a bond for the lien, but instead wanted to hold an escrow for the full amount of the lien, plus a greater sum to cover potential extra costs for interest or attorneys' fees associated with the lien and its removal. Meanwhile exposed plywood and other building materials were deteriorating under the weather as the balance of construction financing remained stalled and the house remained only partially built.

Concurrently, Builder proceeded to a foreclosure on its invalid mechanic's lien. Following the Essex Building Inspector's involvement, the Town of Essex refused to grant a Certificate of Occupancy (CO) for four years. Petitioner therefore was forced to finance an unfinished house for several years. During this time Petitioner couldn't sell his former home and move to the new one, because it was only partly built. For four years, due to the lienor Builder's actions, Petitioner was unable to (1) finance [due to the lien and foreclosure], (2) build [due to the Stop Order], (3) sell [due to the withheld Certificate of Occupancy], or (4) use [due to an unfinished shell] his house, but remained obligated for all property loans, taxes and insurance.

Pre-trial legal proceedings increased because certain litigation expenses could be shifted to the public through chargebacks to the Town's insurer due to the involvement of the Essex Building Inspector. The Town, for which Builder had served as First Selectman, retained several law firms against Petitioner. Petitioner removed equity from his former home to avoid loss of his partially-built home. Petitioner's home costs increased dramatically from about $1,000 to over $7,000 per month as a hearing on the validity of the lien was deferred for several years until the hearing could be held at trial as part of the foreclosure action.

As a further complication, for 4½ years Builder refused to disclose in pre-trial proceedings any receipts or contract information to support its claim for extra materials outside the contract, the basis for its lien claim. Connecticut's mechanic's lien statutes permit this result because no contract or agreement is needed in order to initiate or maintain a lien. Since Builder never progressed farther than a foundation, only four elements accounted for its claims: wood, steel, concrete and fill. At trial Builder attempted to show that it had "just cause" under Connecticut law for placing its mechanic's lien by submitting receipts and charts in court for large quantities of each of these materials for the house foundation: (1) over half a mile of unaccounted wood, (2) over 10,000 feet (two miles) of steel reinforcing rods, (3) increased pricing for concrete, and, (4) greatest of all, over 7,000 cubic yards of fill and related material brought to the site, nearly 80% of which Builder claimed to have supplied personally. Since the filled building area of the home site is only 125 feet across, a pile 43 feet high would have had to be found on the site if these fill receipts were true, a pile higher than the house is tall.

At trial Builder served as its own fact witness and its own expert witness concerning these materials. Petitioner presented its experts and asked for an independent State review of the building site. None was provided because the Connecticut State's Attorney's office believed that since the Builder's construction occurred in 1990, but the trial was not concluded until six years later in 1996, Connecticut's statutes of limitation had run. The State's Attorney's office also declined to consider whether perjury existed in association with Builder's large claims for extra materials, which were used as its "just cause" basis for bringing the mechanic's lien which the Court in 1995 declared to have been invalid from its inception in 1991.

## B. The Proceedings Below

The mechanic's lien which is the subject of this Petition was placed on Petitioner's home under construction on April 22, 1991. Petitioner's requests for a hearing in discharge were denied because a pending foreclosure on the lien was filed shortly thereafter by the mechanic's lienor.

In August 1992 a Court found the lienor to have executed a valid waiver of the lien, and therefore did not grant a hearing in discharge. However, the mechanic's lienor asked to have the mechanic's lien reinstated and in March 1993 the Court ordered that the original mechanic's lien in fact continued as a property attachment pending a trial on the associated foreclosure action on the lien. Subsequent requests for a hearing in discharge were denied by the Connecticut Courts in reliance on Connecticut General Statutes § 49-35a(a), which precludes a post-attachment hearing on a mechanic's lien if a foreclosure on the lien is pending at the same time.

A hearing in discharge ultimately was held on the mechanic's lien in February 1995 as part of the foreclosure proceedings. The Court found the lien to be invalid from its inception, but awarded no damages. The Court then went into recess until the following January 1996, when it proceeded with consideration of the case as a breach of contract matter based on Builder's "just cause" assertion of having supplied extra materials. Petitioner counterclaimed that the amount of materials asserted by Builder could not be found on the site. After pleadings had closed, Builder was given leave by the Court to file counterclaims to Petitioner's counterclaims. Petitioner had asked for a jury trial 2½ years before in 1993 on the material claims, and asked again in 1994, but was denied these requests. In the course of a trial

to the bench the Builder served as its own fact witness and his own expert witness concerning the extra materials.

At the end of the trial the Builder created charts purporting to show the location, quantity and dimension of the extra materials. The Trial Court ruled for Builder based on these charts and Builder's "just cause" claims for extra payment. The Trial Court awarded Defendant no compensation for Builder's invalid mechanic's lien.

The Trial Court stated in its decision that Petitioner had not mitigated damages by listing or selling his former home during this time. However, since the Essex home under construction was for several years only a partially-built shell without heat, water, plumbing or electricity, Petitioner had no place else to live. Moreover, Petitioner is in solo practice and uses his residence as an office. After the Trial Court's decision it became possible to inhabit the new house and list the former house for sale. However, in the intervening years as legal proceedings went on, the Connecticut real estate market declined sharply with a loss of jobs and population in the central part of the State. The former house remains listed for sale, but unsold, as of this date.

In its opinion officially released on July 29, 1997, the Connecticut Appellate Court held that the Trial Court did not abuse its discretion in refusing to award damages to the Defendant as a result of the Plaintiff's invalid mechanic's lien, and that Petitioner was not damaged at all as a result of the invalid mechanic's lien.. The Court noted that C.G.S. § 49-51(a) "provides that a court '<u>may</u> award the plaintiff damages for the failure of the defendant to make discharge [of a lien] upon request', and that such damages therefore are discretionary." *Riggio v. Galiette*, 46 Conn. App. 63, 66 (1997).

Petitioner timely raised due process issues and the holdings in *Doehr*, *Roundhouse* and other U.S. Supreme Court cases associated with procedural due process under the Fourteenth Amendment of the U.S. Constitution. These cases were raised at pre-trial proceedings, at the trial level, at the appellate level and as part of the Petition for Certification to the State of Connecticut Supreme Court. Excerpt sections from Petitioner's Appellate brief, and its Petition to the Connecticut Supreme Court, are attached in the Appendix to this Petition as examples of how these issues were timely raised. The U.S. Supreme Court's landmark 9-to-0 procedural due process decision in *Doehr* was based on Connecticut attachment statutes, and was decided in 1991 when the present case was commenced. Nevertheless, no reference was made by any Connecticut Court, at any level, to *Doehr* or related U.S. Supreme Court cases, or to any constitutional issues. Decisions were based solely on a literal reading of Connecticut statutes, even though the General Assembly's own Law Revision Commission provided advice, supplied to both the State's Legislature and its Courts, that following the U.S. Supreme Court's decision in *Doehr*, Connecticut's mechanic's lien laws did not appear to conform to procedural due process requirements.*

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*State of Connecticut Law Revision Commission, Twentieth Annual Report, March 1995, "Recommendations for Enactment of an Act Concerning Mechanic's Liens", Page 77:

> Under current law, hearings are often delayed or not held because the foreclosure action is pending and the court wishes to avoid the additional hearing. However, under recent due process decisions, including Connecticut v. Doehr, it is clear that the imposition of a lien constitutes a taking for constitutional purposes. Where such a taking has taken place, the owner of the encumbered property is constitutionally entitled to a prompt hearing to determine that probable cause exists to uphold the lien. The failure of current law to provide a right to a prompt hearing within a specified period, with adequate notice of rights, therefore constitutes a defect in due process procedures.

## SUMMARY OF ARGUMENT

The landmark procedural due process decisions of this Court during the last thirty years in cases such as *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) addressed primarily standards for a timely and meaningful post-deprivation hearing in matters associated with personal property. In such cases there typically was a physical taking of property permitted under State law, and therein arose the basis for identifying the procedural due process protection which should be afforded to persons under the Fourteenth Amendment of the U.S. Constitution.

The facts and circumstances which underlie these cases have made them a cornerstone of legal education associated with procedural due process requirements under the Fourteenth Amendment. As Chief Justice William Rehnquist appropriately commented in *Doehr*, "These cases, which represented something of a revolution in the jurisprudence of procedural due process, placed substantial limits on the methods by which creditors could obtain a lien on the assets of a debtor prior to judgment. But in all of them the debtor was deprived of the use and possession of the property." *Doehr* at 27.

Until *Doehr* there was little guidance with regard to procedural due process standards under the Fourteenth Amendment to be afforded to deprivations of real property. Among the Federal Circuits, confusion arose after the District Court in *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997, 999 (Ariz. 1973) held that the filing of a mechanic's lien did not cause the deprivation of a significant

property interest of the owner, and this Court thereafter summarily affirmed that decision. 417 U.S. 901 (1974).

However, a person's right to an unimpaired credit history may be one of the most significant property rights which that person holds. As the facts of the present case illustrate, that right is especially significant if a person is involved with the construction or financing of what typically is the most valuable asset which most citizens may own: a home. Home ownership is associated with the availability of title insurance, which is a requirement in order to obtain most home mortgages. A typical home mortgage spans fifteen to thirty years. Most of a person's productive lifetime and earnings may be spent in the payment of a home mortgage. The equity in a home may be needed for other essential purposes. However, Connecticut's mechanic's lien laws permit a mechanic's lienor unilaterally to place a lien on a property and then, by proceeding to a foreclosure action, to lock out an opportunity for a post-deprivation hearing to determine whether the lien has any validity.

Present day business, credit and home ownership practices require a closer look at the actual effects of the imposition of a mechanic's lien. These effects are more complex than can be examined and understood from the facts in a limited situation, such as the leasing of trailer-park slips in *Spielman-Fond*. Chief Justice Rehnquist very succinctly summarized the major step which this Court was taking in *Doehr* in advancing a better understanding of these growing interrelationships. Referring to this Court's summary affirmance of *Spielman-Fond* he noted:

> Other courts have read this summary affirmance to mean that the mere imposition of a lien on real property, which does not disturb the owner's use or

> enjoyment of the property, is not a deprivation of property calling for procedural due process safeguards. I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisturbed possession. "For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Ante*, at 11. Given the elaborate system of title records relating to real property which prevails in all of our States, a lienor need not obtain possession or use of real property belonging to a debtor to significantly impair its value to him. *Doehr* at 27.

This Court should use the facts in the present case to go farther than the facts in *Doehr* could permit. *Doehr* was based on a pre-judgment attachment of a home stemming from a tort claim of assault and battery. All of the landmark cases associated with the Due Process Clause examined either the requirements of a bond, or the finding that an owner of personal property had the opportunity to move that property before a creditor could attach or take possession of it. This moveability gave rise to the observations that "exigent circumstances" associated with the imminent removal of the personal property in question might be a reason for permitting a property attachment to occur prior to the opportunity for a hearing. Nevertheless, the Fourteenth Amendment required that a post-deprivation hearing must be prompt, and that some safeguards against erroneous or malicious deprivation, such as the provision of a bond by a creditor, must be in place.

In concluding his opinion in *Doehr*, Chief Justice Rehnquist noted: "We should await concrete cases which present questions involving bonds and exigent circumstances before we attempt to decide when and if the Due Process Clause of the Fourteenth Amendment requires them as prerequisites for a lawful attachment." *Doehr* at 30.

This case provides those concrete examples, squarely based on a lien on real property, and distinguishable for the following reasons.

**(1) A mechanic's lien results in a deprivation of property (post-*Doehr* standards), and does more than simply impinge upon economic interests of the property owner (*Spielman-Fond* standard).**

*Spielman-Fond* was decided in 1973 and involved a mechanic's lien placed on a trailer park owned by a corporation in Arizona. The Trial Court reasoned that the property owners had not been deprived of the possession or use of their property, and that there had been no taking without procedural due process safeguards, because the mobile home park owners could still rent trailer slips to persons who would be unaware of the mechanic's lien. Although a lien clouds title, the Court a quarter of a century ago in that case concluded, in its much-quoted decision:

> Even though a willing buyer may be difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. (*underlining added*) The right to alienate has not been harmed, and the difficulties which he creates may be ameliorated through the use of bonding or title insurance. *Spielman-Fond* at 999.

The facts in *Spielman-Fond*, however, fit very few mechanic's lien cases very well. (1) That case did not involve a home or commercial building, but only land used for trailer rental slips. (2) Open land in Arizona a quarter of a century ago may not be the best model for assessing economic impairment resulting from mechanics' liens where valuable residential dwellings or commercial properties are involved, or for property under construction where ongoing mortgage financing and title insurance are basic, critical needs. A mechanic's lien on a mall or condominium development, for example, can cloud the entire project, not simply the involved unit. Moreover, if a contractor puts a shovel in the ground before a bank or title insurer closes on a loan, the contractor can obtain priority over those subsequent parties. (3) The land in *Spielman-Fond* was owned by a corporation and could be sold to another mobile park rental corporation, which could pay for the property out of earnings, stock issuance or corporate bonds and thus bypass a need for bank financing and title insurance. Otherwise the problem of a lien simply passes with the property to a new owner, who thereby inherits the same problem. Amid today's financial marketplace and electronic credit networks a mechanic's lien, like an environmental problem on a property, will severely limit most opportunities for the sale of the property to which it attaches.

**(2) *Spielman-Fond* confuses the issues of where "economic interests" of a property owner end, and where constitutionally-protected property rights under the Fourteenth Amendment begin.**

The *Spielman-Fond* case relies on a belief that a mechanic's lien results in depriving a property owner of mere "economic interests" in a property, and not an ownership interest in the

property itself. Fundamentally, this premise requires a person to conceptually dissociate the income which can be derived from the rental of a trailer park slip, with the physical ownership of the property itself. However, in most cases income and property ownership cannot exist as disconnected rights. Economic interests and property rights are separate only if the trailer park owner does not need to re-finance, improve or sell the trailer park. If slip rental business declines and the owner, for example, wants to erect a building on the trailer park site, the owner is not going to be able to obtain title insurance and construction financing because of the lien. The present case illustrates that as a lien becomes larger and as title insurers and banks may seek, in place of a bond, an escrow larger than the claim of the lien itself, access to financing becomes more remote by virtue of the existing lien.

The present case reflects the changing banking environment in the United States and globally, and the vast network of electronically-recorded credit histories which track the majority of citizens in this country. Credit histories are used commercially, and are sold for a fee to individuals. In the present case construction financing began with a small bank in a small town, Deep River, Connecticut. That bank had become part of a larger bank in New London, Connecticut, which in turn was acquired by a Providence, Rhode Island bank while construction and the mechanic's lien went forward. In turn that bank was acquired during that time by a foreign bank, the Royal Bank of Scotland. These banks had taken over financing from the original construction financing bank, which itself had become insolvent in the interim. Because of the mechanic's lien on Petitioner's home, all financing at various points in time came to a standstill, and home construction with it.

In today's financial markets, a bank has to be able to package a mortgage and sell it in the secondary market. A property with an environmental problem such as a buried oil tank, or an attachment such as a mechanic's lien, cannot be written, packaged and sold by a bank. The more loans which a bank cannot package, the more it must keep inhouse, which can affect its liquidity and financial rating.

Mortgage-backed securities also are created by banks from home mortgages and are sold to the most conservative investors in the country, such as reinsurance companies that provide insurance to other insurers which in turn manage large life, health, pension and property-casualty accounts across the country. Banks can sell mortgages to the Government National Mortgage Association (GNMA) or the Federal National Mortgage Association (FNMA), but only if the mortgages are free of encumbrances, such as mechanics' liens. GNMA and FNMA thereby create federally-backed securities which normally return a rate about one percent above thirty-year United States Treasury instruments. However, the absence of procedural due process safeguards in Connecticut's mechanic's lien laws can remove a property from accessibility to this necessary financial network, and impair personal credit history at the same time.

Personal credit histories, adversely affected by mechanics' liens, also are being used by property-casualty insurers for setting personal automobile insurance rates. The mechanic's lien procedures adopted in Connecticut 150 years ago to address the needs in covered wagon days as citizens headed West, are now ready to enter a new century and a highly interconnected, electronic, global financial marketplace. The absence of requirements in Connecticut's present mechanic's lien laws for (1) a contract, (2) judicial involvement or (3) a bond even predate the Fourteenth Amendment itself. Today, only in the most limited cases

could economic interests in a property be envisioned as separable from property rights of ownership in the property.

**(3) The alternative basis for affirmance of *Spielman-Fond* by this Court, based on a pre-existing interest in the property to be attached, is outweighed by (1) the uncertainty of whether improvements actually were incorporated in the property, and (2) the lengthy postponement of a hearing under Connecticut statutes.**

This Court's affirmance of the *Spielman-Fond* decision was distinguished in *Doehr* on the alternative basis that the Plaintiff in *Doehr* had no pre-existing interest in the real property which he sought to attach in order to secure a prejudgment remedy in a tort case. Although the *Doehr* Plaintiff had no pre-existing interest in having improved the property on which an attachment was sought, Connecticut statutes also fail to assist in achieving any certainty as to whether, and to what degree, a mechanic or materialman may have improved a property. The present case illustrates that (1) no contract needs to be produced in order to initiate a mechanic's lien in Connecticut, (2) the adverse effects of the lien to the property owner are unilateral and immediate, but a hearing as to its validity can be deferred for several years, and (3) aside from identifying that a pre-existing interest exists in a particular property, a mechanic's lien does not provide any certainty in Connecticut that supplies or services actually were provided to justify the lien.

Unlike personal property, real property cannot be moved. There is less urgency to compromise the Due Process Clause when provisions for a timely hearing can be made in association with a need to secure an interest through a property attachment. Most other states have contract pre-filing, bond, hearing and other mechanic's lien safeguards.

Some states, such as Connecticut, originally adopted their mechanic's lien laws in the pre-industrial era of the 1830's to 1850's when growing agricultural families along the Atlantic Coast headed West by the hundreds of thousands in order to claim free land in the Ohio Valley and the Western Reserve. It was unlikely that travel and communications in that age would permit a defaulting property owner to be found. There were good reasons to permit home contractors to attach a property in place of looking for the vanished property owner in the vast stretches of frontier America.

*Doehr* was a landmark case because it was so explicit in identifying changes in America in banking, in electronic credit history communications, and in finance:

> For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chances of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is no insecurity clause. *Doehr* at 11.

Confusion has been created among the Federal Circuits regarding the protection to be afforded attachments of real property. In *Parks v. Ford*, 556 F.2d 132, 160 & 161 (1977) the Third Circuit noted that "seizure" in commercial transactions between a creditor and a property owner "whether by judicial process or by self-help retention of possession, is accomplished ex parte." The Court in *Parks* cited *Spielman-Fond* as one of the few federal cases which deals with property attachments through mechanics' liens. In reviewing this case and others at that time, the Court looked for higher judicial authority and concluded "In none of these cases has the court made an analysis of sufficient

lucidity to compel adherence. We are, in short, on our own." *Parks* at 161.

The uncertainty only became greater as more years went by. Following *Doehr* in 1991, the Tenth Circuit in *Cobb v. Saturn Land Co., Inc.*, 966 F2d 1334 (1992) noted that the District Court dismissed the Plaintiff's claim by relying on *Spielman-Fond*, and related cases and holding that "filing a lien does not amount to a taking of sufficient magnitude to implicate due process protections." *Cobb* at 1336.

However, it noted that after the District Court rendered its decision in the case before it, this Court in *Doehr* at 12, quoting in part *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80,85 (1988), stated that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" The Circuit Court then summarized: "Thus the authorities the district court relied on have been undermined." *Cobb* at 1336.

In the original March 24, 1992 Answer and Counterclaim of the Petitioner, two additional examples were briefed for the Trial Court concerning the pre-existing interest in a property associated with a mechanic's lien. In *Cook v. Carlson*, 364 F. Supp. 24 (S.D. South Dakota, 1973) a contractor made improvements for a tenant and then brought a lien against the tenant's landlord who owned the property. The *Cook* Court explained that certain factors can mitigate the existence of a lien: "while the value of the property may be diminished by the amount of the lien, the improvements, at least theoretically, have increased the value of the property

by the amount of the lien, thereby minimizing harm to the owner." *Cook* at 27.

This statement assumes that improvements have been made. What happens, as in the present case before this Court, if there is a question about the actual amount of material supplied, or the quality of the work provided? Connecticut's mechanic's lien laws provide an excellent context in which to examine this issue. As the Connecticut Supreme Court identified in 1975 in *Roundhouse*, no contract is needed to initiate a mechanic's lien in Connecticut, only a mere conclusory statement that an amount is owed. Under Connecticut law, nothing would prevent a mechanic's lienor in the present case from claiming that the amount of the lien is really the full value of the expected job to build an entire house. A foreclosure action and other tactical efforts in Connecticut can add so many years before a hearing is held on the validity of the lien, that the opportunity to obtain a recovery for resulting losses becomes remote or nonexistent. This Court appropriately recognized in *Doehr* at 21 "the use of attachments as a tactical device to pressure an opponent to capitulate", and that even the use of a bond might not ultimately make up for the extent of resulting harm which "grows with the length of the suit." *Doehr* at 22.

Petitioner's original Answer and Counterclaim also briefed the case of *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Florida, 1974). In that case an air conditioner contractor recorded a lien for $416 against homeowners whom the *Ruocco* Court found had received the benefit of an improvement to their home. No judicial participation or prior hearing was needed to record the lien. The Court reasoned that the lien in *Ruocco* did not accomplish an "actual dispossession of realty or personalty". *Ruocco* at 437. However, it also recognized that the facts in *Ruocco*

did not present the best fact pattern on which to delineate Fourteenth Amendment procedural due process protections:

> There may be instances when the deprivation of property is so severe and the post-deprivation safeguards are so inadequate that a prior opportunity to be heard is necessary. This is not one of them. *Ibid.*

**(4) The present case illustrates that no judicial economy is achieved by deferring a timely hearing associated with securing rights through a mechanic's lien, and that real property offers no "exigent circumstances" threat of potential property removal by the property owner before due process rights can be provided through a hearing.**

Because personal property can be easily moved, the potential loss of such property to a creditor was a reason for finding that "exigent circumstances" could exist. This Court found that procedural due process owed to a property owner sometimes had to be balanced for a very short time against risks of loss of the property which was subject to attachment by a creditor. The posting of a bond, and the opportunity for a prompt post-deprivation hearing before a judicial officer, offered some balancing of property rights.

The balance is a delicate one. In *Doehr* this Court quoted *Fuentes*, 407 U.S. 67,86 (1972): "The Fourteenth Amendment draws no bright line around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Doehr* at 15.

No judicial economy was achieved in Connecticut to defer a hearing from 1991 until 1995 on the invalid lien ultimately reviewed in this case. The mechanic's lienor's case and the

involvement of the Town of Essex resulted in approximately 200 pretrial motions, orders and related actions.

By comparison, procedural due process cases involving personal property can be advocated with less adverse financial consequence than real property cases. Even a person with very few resources will suffer only a limited loss upon the repossession or replevining of a stereo or a refrigerator. A public interest group can assist in advocacy in these matters. In contrast, real property requires the ongoing payment of mortgage interest, insurance, property taxes, utilities and other maintenance expenses while the lien persists. As a result of an invalid mechanic's lien, a property owner can be obligated for all of these expenses, while being deprived of the opportunity to sell the property, or to obtain needed financing or title insurance.

As a result of the invalid mechanic's lien, the Petitioner's name was published in the *Commercial Record* as having an impaired credit history and he was declined for title insurance, credit cards and mortgage financing. The case was particularly extreme because the home under construction was only partially built and ongoing construction financing was crucial to completing construction. The Petitioner's only access to credit was to remove equity from his existing home. As a result of the lien the Petitioner had to pay a premium through additional points to the bank and a higher title insurance premium. Title insurers also required not merely a bond, but an escrow for the entire amount claimed by the lienor, plus additional amounts to cover any additional attorneys fees or interest which might accrue.

In Connecticut if a lienor claims to have had "just cause" for the amount claimed in the lien, no damages will be awarded, as in this case. The mechanic's lienor, again as in

this case, can even be off the subject property more than the required statutory number of days for bringing a lien, accept payment, cash payment checks, execute a waiver of mechanic's lien, and then claim that the waiver was provided through inducement. A Connecticut Court may find that the lien was invalid, but the lienor will still be excused from any damages.

## CONCLUSION

The development of banking practices, and the electronic reporting of personal credit histories, make the issues in this case ripe for consideration. They were not as well defined in prior years when the landmark work of this Court, in providing guidance on requirements for the protection of Fourteenth Amendment procedural due process rights, was initiated. This Court should use this case to review the constitutionality of Connecticut's mechanic's lien statutes, and to resolve confusion at the Federal level following *Doehr*. As another Connecticut-based case, it would provide a further view forward of the Due Process Clause than the facts in *Doehr* permitted.

Respectfully submitted,

ROBERT J. GALIETTE
(*Counsel of Record*)
Robert J. Galiette, Attorney At Law
3 Teal Lane
Essex, Connecticut 06426-1046
Telephone: (860) 767-0503
Facsimile: (860) 767-0508
*Counsel for Petitioner*

December 20, 1997

# APPENDIX

No. 64715

| | | |
|---|---|---|
| Richard Riggio & Sons, Inc. | : | Superior Court |
| v. | : | Middlesex J.D. |
| Robert J. Galiette, Et Al. | : | April 17, 1996 |

**MEMORANDUM OF DECISION**

This action was commenced by writ, summons and complaint, filed by the plaintiff, with a return date of February 25, 1992. The complaint seeks foreclosure of a mechanic's lien filed by the plaintiff on April 22, 1991.

The plaintiff, Richard Riggio & Sons, Inc., is a building contractor and the defendants, Robert and Sandra Galiette are lot owners who entered into a building contract with the plaintiff. Hereafter, the defendants will be referred to in the singular.

This matter was scheduled for trial on February 1, 1995 and on that date, after reviewing the pleadings, the court, sua sponte, decided to bifurcate the trial and to determine whether the mechanic's lien was valid before proceeding with the breach of contract phase of the case. The court, based on admissions in the pleadings, determined that the plaintiff executed a valid mechanic's lien waiver and claimed that same was fraudulently procured by the defendant. After a full hearing, the court held that the plaintiff failed to prove by a clear and convincing evidence that the defendant obtained the mechanic's lien waiver, by fraud and dismissed the complaint. The court continued the trial so that the parties might amend their pleadings to respond to the remaining issues between the parties, absent the foreclosure of the mechanic's lien. The pleadings were amended and closed and the parties were at issue.

A full trial was held to the court on the amended pleadings.

The court, based on a preponderance of the credible, relevant and legally admissible evidence finds the facts to be as follows:

By agreement dated August 6, 1990, the plaintiff and the defendant contracted that, in consideration of the sum of $124,557.00, the plaintiff agreed to construct for the defendant new construction at the premises known as Lot 6, Teal Lane, Essex, CT, in accordance with plans and specifications submitted

by the defendant and Schedule A, attached to the contract. The specifications, and blueprints were drawn by the defendant, Robert Galiette, personally.

Schedule A read:

1. Excavation as per specifications
2. Concrete work for entire project as per specifications and prints
3. All framing and roofing for the main house and porticoes (not breezeway. and garages).
4 No windows, doors, siding or trim have been included, except for roof trim
5. All additional work to be priced separately

The plaintiff, in March of 1990, long before the contract was entered into, commenced certain site work to get the project going. During the course of construction the contract was subject to various modifications due to soil conditions, site relocation and the elimination of one garage and changes in design and location of the remaining garage. I

The defendant drew the plans and maintained a hands on interest in all phases of the construction.

The plaintiff performed under the contract and the agreed upon changes, all in accordance with the design and specification of the defendant.

The contract contained no date for completion, therefore, the court must consider whether under the facts and circumstances in this case time was of essence.

The court expressly finds that time was not of essence under the contract. The defendant never expressly complained to the plaintiff of the delays and in-fact up to the time that the defendant discharged the plaintiff, the defendant led the plaintiff to believe that the plaintiff could resume work in late winter. The defendant paid to the plaintiff $18,000.00 on January 14. 1991, which payment, the defendant testified was to purchase materials for the house framing. Instead, the defendant discharged the plaintiff before the plaintiff could resume work under the contract.

The plaintiff s performance included the excavation, concrete work, one-half the first floor deck and providing of fill.

Obviously, at some time during the performance of the contract the defendant believed that he was being overcharged and that

certain construction materials were taken from the work site by the plaintiff. The court expressly finds these allegations unproven.

The plaintiff's performance under the contract and the extras thereto were at all times in conformance with the design and direction of the defendant. The defendant took extraordinary interest and pride in his design and its ultimate culmination into a dwelling compatible to its location in the historic town of Essex. The defendant was present at the site at most crucial phases of construction.

The major complaints pressed by the defendant included cracks in the foundation, leaks where separate pours of the foundation came together and improper sealing of the portico decks. The court finds that the cracks are a result of the normal settling and checking of poured concrete foundations; the leaking at foundation junctions were caused by design flaws that failed to designate a seamless pour when the foundations of the portico and the main house were not unified and integrated but were poured separately and that the portico decks were constructed as designed.

Further, the court expressly finds that the excessive carrying costs being incurred by the defendants are not attributable to the plaintiff, but are the defendants' own choice. The defendant never put his Avon House on the market and the fact that he has greatly increased his cost are the product of market forces and conditions and the personal preference of the defendant.

The court finds that the plaintiff performed under the contract to the extent that he supplied material and labor amounting to $92,900.79. The defendant paid to the plaintiff the sum of $81,080.00 and received a credit of $241-31. There is due and owing to the plaintiff by the defendant the sum of $11,576.49.

The court finds the issues on the defendants' counterclaim for the plaintiff and finds the issues for the plaintiff on the plaintiff's counterclaim.

Accordingly, judgment may enter for the plaintiff on the defendants counterclaim and judgment may enter on the first count of the plaintiffs' counterclaim for the plaintiff to recover of the defendant the sum of $11,576.49. Shortly after discharging the plaintiff, the defendant made a tender of this amount to the

plaintiff which the plaintiff refused claiming an additional $15,000.00 in lost profits. The plaintiff seemingly abandoned the claim and offered no proof of such loss. Therefore, this court awards no interest to the plaintiff. The court awards the plaintiff counsel fees in the amount of $8,500.00. In the exercise of its discretion, the court allows no penalty or counsel fees for what the court determined to be an invalid mechanics lien filed by the plaintiff. Under the circumstances in this case the plaintiff had just cause to believe the lien waiver was invalid. !

Plaintiffs counts 2 and 3 are dismissed as not proven.

SPALLONE
TRIAL REFEREE

Judgment entered in accordance with the foregoing memorandum of decision.

Felicia Santostefano, Assistant Clerk

A - 5

**Excerpt from Petitioner's Appellate Brief**
**(Defendant-Appellant)**
**To the Appellate Court, State of Connecticut**
A.C. No. 15996
(representing certain constitutional issues raised on appeal)

.... Likewise, it is unreasonable to import into the remedial intentions of C.G.S. §49-51(a) an issue of "just cause", which in most cases would amount to the moving party's having to prove bad faith or malice. In other words, it is far to easy for a lienor, having been proved to have filed an invalid lien, to argue that he did so with the best of intentions.

Neither is the trial court's interpretation of C.G.S. §49-51 "just". The purpose of the damage provisions of the statute was to attempt to recompense the victim of the invalid lien. By the very language of the statute, the legislature recognized that such damages could be measured by the costs of the litigation that would be required to discharge the lien, or by the economic costs of having this encumbrance upon one's property, or both. In the instant case, it took the defendant some four years to have a court adjudge the plaintiff's lien invalid and discharged, only to be told simultaneously that there would be no recompense whatsoever for four years of encumbrance and four years of litigative costs.

Finally, the trial court's interpretation seriously conflicts with the due process rights guaranteed property owners such as the defendants under both the federal and state constitutions. Our Supreme Court, in the case of Roundhouse Construction Corporation vs. Telesco Masons Supplies Co., 168 Conn. 371 (1975), pronounced it "fundamental that property cannot be taken without procedural due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article first, § 10 of the Constitution of

Connecticut," Page 376. While, the Roundhouse decision continues, Page 384, "It is true that the deprivation which results from the filing of a mechanic's lien is not as obvious or as great as the dispossession of property under the statutes struck down in Fuentes vs. Shevin, 407 U.S. 77, 92 S.Ct. 1983, 32 L.Ed.2d 556, and Sniadach vs. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, but the recording of a mechanic's lien, while it does not prevent alienation of the property does, as a practical matter, severely restrict the opportunity for and possibility of its alienation."

While the Roundhouse court noted that, Page 380, "The United States Supreme Court has not as yet spoken definitively on the subject of the due process requirements of mechanic's lien statutes," the nation's highest court did obliquely address this issue in its 1991 decision in Connecticut vs. Doehr, 111 S.Ct. 2105 (1991). "For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. ... To the contrary our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection," 2113.

The language of C.G.S. § 49-51(a) resonates with the legislature's concern that this language might take a step toward protecting those property rights delineated under Roundhouse and Doehr. To inject into the statute, as the trial court's decision does, the suggestion that, in order to be entitled to damages thereunder, the lienee must be able to prove some variety of bad faith or malice on the part of the lienor, would in effect not only overburden the lienee, but would effectively nullify the remedial intent of the legislature.

....

evidence presented. The only testimony on which the trial court relied is that which follows. The plaintiff's counsel acknowledged that the law firm had received the dormancy calendar but had not gone to the dormancy hearing. The plaintiff made no attempt to close the pleadings, nor did he move to exempt the case from the dormancy calendar. The parties agreed that there was no activity in the case file for the many months between the judgment of dismissal and the letter from the defendants' counsel to the plaintiff's counsel informing the plaintiff's counsel that the case had been dismissed. The plaintiff's counsel argued at the hearing in the trial court that she had failed to notice the lack of activity on the file because she was also working on an entirely separate, yet factually similar, case involving Minwax at the same time. The plaintiff's counsel also alleged that she continued to work unilaterally on the file but without any knowledge by the defendants of the unilateral work. None of this testimony relates to whether the plaintiff had received notice of the judgment or rebuts the presumption that the notice of dismissal issued by the court was received by the plaintiff.

I conclude that the plaintiff's motion was not timely filed and that the trial court did not have jurisdiction to open the judgment. I would reverse the trial court's judgment and would remand the case with direction to render a judgment of dismissal.

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## RICHARD RIGGIO AND SONS, INC. *v.* ROBERT GALIETTE ET AL.
## (AC 15996)

Dupont, C. J., and Spear and Hennessy, Js.

*Syllabus*

The plaintiff building contractor sought, inter alia, to foreclose a mechanic's lien that it had filed against certain of the defendants' real property. The defendants filed a counterclaim alleging that the lien was invalid

and seeking damages stemming from the plaintiff's filing of the invalid lien. The trial court determined that the mechanic's lien was invalid, but refused to award damages to the defendants, and the defendants appealed to this court claiming that the trial court had failed to address the issue of damages. *Held* that the trial court did not abuse its discretion in refusing to award damages; that court considered and rejected the defendants' claim for damages, determining that the defendants had not been damaged by any acts of the plaintiff.

Argued May 2—officially released July 29, 1997

*Procedural History*

Action for breach of contract and to foreclose a mechanic's lien filed against certain of the defendants' real property, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Daniel F. Spallone*, judge trial referee; judgment for the plaintiff, in part, on the complaint and for the plaintiff on the defendants' counterclaim, from which the defendants appealed to this court. *Affirmed.*

*Mark R. Leder*, with whom was *Robert Galiette*, for the appellants (defendants).

*Gregory M. Harris*, for the appellee (plaintiff).

*Opinion*

SPEAR, J. The defendants, Robert Galiette and Sandra Galiette, appeal from the judgment of the trial court in favor of the plaintiff, Richard Riggio and Sons, Inc., on the defendants' counterclaim that damages allegedly resulted from the plaintiff's filing of an invalid mechanic's lien. The defendants contend that the trial court improperly failed to consider the issue of damages, after concluding that the plaintiff's mechanic's lien was invalid, because of a mistaken belief that a finding of bad faith was required before damages could be awarded. We affirm the judgment of the trial court.

The record discloses the following facts and procedural history. The plaintiff, a building contractor, sought

to foreclose a mechanic's lien on the defendants' property in Avon and alleged that the defendants failed to pay the balance due pursuant to a construction contract between the parties. In their counterclaim, the defendants asserted that the plaintiff breached the contract by both overcharging the defendants and substantially failing to perform specified work under the contract. The trial court bifurcated the mechanic's lien foreclosure from the breach of contract portion of the case. After determining that the plaintiff executed a valid mechanic's lien waiver and dismissing the plaintiff's claim that the defendants had procured such lien waiver fraudulently, the trial court, with amended pleadings, addressed the remaining contract dispute between the parties.

The trial court found that the contract, which contained no date for completion, was subject to various modifications at the defendants' direction.[1] The trial court concluded that the plaintiff's performance under the contract was "at all times in conformance with the design and direction of the defendants." Additionally, the court found that "[u]nder the circumstances in this case, the plaintiff had just cause to believe the lien waiver was invalid." Accordingly, the court found for the plaintiff on its contract claim and awarded the plaintiff damages and counsel fees. The court did not award any damages to the defendants for the plaintiff's filing of an invalid mechanic's lien. This appeal followed.

The defendants claim that the trial court improperly failed to consider the issue of damages pursuant to § 49-51.[2] We disagree.

[1] Such modifications, all of which were drafted by the defendant Robert Galiette, were due to soil conditions, site relocation, and various design changes.

[2] Section 49-51 (a) provides in relevant part: "Any person having an interest in any real or personal property described in any certificate of lien, which lien is invalid but not discharged of record, may give written notice to the lienor . . . to discharge the lien. . . . If the lien is not discharged within

We recognize that the defendants are not claiming on appeal that the trial court abused its discretion in not awarding damages pursuant to § 49-51. Rather, the defendants claim that the trial court never addressed the issue of damages at all. We must first construe the language of § 49-51 in order to address this claim.

General Statutes § 49-51 (a) provides that a court "*may* award the plaintiff damages for the failure of the defendant to make discharge [of a lien] upon request." (Emphasis added.) It is well established that "[i]f . . . language . . . is clear and unambiguous, we will interpret it in accordance with its plain meaning absent a compelling reason to the contrary." (Internal quotation marks omitted.) *State* v. *Angell*, 237 Conn. 321, 327, 677 A.2d 912 (1996). Clearly, the legislature's inclusion in the statute of the word "may," as opposed to "shall," indicates a discretionary power to award damages. Additionally, § 49-51 (a) provides that "[i]f the court is of the opinion that such certificate of lien was filed without just cause, it *may* allow, *in its discretion*, damages to any person aggrieved . . . ." (Emphasis added.) Again, the plain language of the statute is clear. The language of the statute does not indicate that a finding of bad faith is required for an award of damages. In its memorandum of decision, the court stated that "[u]nder the circumstances in this case, the plaintiff had just cause to believe the lien waiver was invalid." We do not interpret that statement to mean that the court believed that it could not award damages without also finding that the mechanic's lien was filed in bad faith.

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thirty days of the notice, that person may apply to the Superior Court for such a discharge, and the court may adjudge the validity or invalidity of the lien and *may* award the plaintiff damages for the failure of the defendant to make discharge upon request. If the court is of the opinion that such certificate of lien was filed without just cause, it *may* allow, *in its discretion*, damages to any person aggrieved by such failure to discharge . . . ." (Emphasis added.)

The defendants assert in their brief that an issue of "just cause" would "in most cases" require a party in the defendants' position to "prove bad faith or malice." They cite to no authority to support this proposition. We conclude that in finding that "the plaintiff had just cause to believe the lien waiver was invalid," the trial court properly adhered to the plain language of § 49-51.[3]

In considering the issue of whether a trial court properly reached and considered the damages issue within the context of § 49-51, our Supreme Court has held that "the trial court's statement[s] must be construed in the context of its opinion in its entirety, including its rejection of the defendant's counterclaim." *Woronecki* v. *Trappe*, 228 Conn. 574, 581, 637 A.2d 783 (1994). Here, the gravamen of the defendants' appeal is that, because the defendants were not awarded damages after the court found that the lien was invalid, the court could not have considered the damages issue. Our review of the record convinces us that the trial court did, in the proper exercise of its discretion, consider and reject the defendants' claim for damages. The trial court did not find that the invalid mechanic's lien caused the defendants' damage but, in fact, found that the defendants were not damaged at all by any acts of the plaintiff.

Specifically, the trial court observed that "[t]he contract contained no date for completion, therefore the court must consider whether under the facts and circumstances in this case time was of the essence. . . . The court expressly finds that time was not of the essence under the contract. The defendant never expressly complained to the plaintiff of the delays and, in fact, up to the time that the defendant discharged

[3] Specifically, in finding that "the plaintiff had just cause to believe the lien waiver was invalid," the court gave proper effect to the following language from § 49-51 (a): " 'If the court is of the opinion that *such certificate of lien was filed without just cause, [the court] may allow, in its discretion, damages* to any person aggrieved' . . . ." (Emphasis added.)

the plaintiff, the defendant led the plaintiff to believe that the plaintiff could resume work in late winter. . . ." Additionally, the court expressly found that "the excessive carrying costs being incurred by the defendants are not attributable to the plaintiff, but are the defendants' own choice. The defendant never put his Avon house on the market and the fact that he has greatly increased his cost is the product of market forces and conditions and the personal preference of the defendant." We conclude that the trial court did both reach and consider the issue of damages in permissibly exercising its discretion pursuant to § 49-51.

We also note that the trial court did not abuse its discretion in refusing to award damages to the defendants. It is well settled in this state that appellate "review of the trial court's exercise of its discretion is limited to questions of whether the court correctly applied the law and could reasonably have concluded as it did. . . . Every reasonable presumption will be given in favor of the trial court's ruling. . . . It is only when an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion." *State* v. *Lasky*, 43 Conn. App. 619, 635, 685 A.2d 336 (1996), cert. denied, 239 Conn. 959, 688 A.2d 328 (1997).

The judgment is affirmed.

In this opinion the other judges concurred.

**Excerpt from Petitioner's Appellate Brief**
**(Defendant-Appellant)** August 12, 1997
**To the Supreme Court, State of Connecticut**
(representing certain constitutional issues raised on appeal)

**Section 4: ARGUMENT TO SUPPORT THIS PETITION FOR CERTIFICATION**

The Connecticut Supreme Court's *Roundhouse* decision was released on April 22, 1975. The General Assembly the following month rushed to fill the gap when that statute was declared to be unconstitutional, and enacted Public Act 75-418 to fill the void. The Act introduced new statutory sections, such as C.G.S. § 49-35(a) to create a procedure to discharge an invalid lien. However, as described earlier in this Petition, the Act created a right to a hearing in discharge, then preempted that right if a property foreclosure was initiated by the lienor. The legislative history of P.A. 75-418 preserves the legislative confusion at that time, such as in House of Representatives records of Tuesday, May 27, 1975, page 4934, regarding House Bill 6200 /P.A. 75-418: "I'm not sure that this meets constitutional challenges and I think we could adopt a Bill which clearly would do so."

More amendments were passed in the following year to adjust some time standards (P.A. 76-290), but all the major procedural due process concerns raised by the Connecticut Supreme Court in *Roundhouse* remained unaddressed. In 1982 the General Assembly recognized that U.S. Supreme Court decisions continued to identify that a mechanic's lien results in a taking of property. However, if a person does not have a home under construction, or is not then in need to borrow on the credit worthiness of the liened property, then the General Assembly found that it might be difficult to identify that a property owner had been actually damaged by an invalid lien. Accordingly, through P.A. 82-270 in a third major statutory amendment, C.G.S. § 49-51(a) was expanded to provide for either actual damages or a threshold of $100 per week, whichever is greater, in the case of an invalid mechanic's lien. Without preferable procedural due process safeguards at the front end of placing an invalid lien, some responsibility by way of mandatory damages was required

at the back end. The legislative history is clear that the court's discretion is supposed to be that it may select between actual damages or $100 per week, not between these choices and no damages whatsoever. The U.S. Supreme Court's subsequent 1991 9-to-0 decision in *Doehr* makes it even more important for certiorari to be granted on the present Petition. *Doehr* at 2115 quoted the landmark case of *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997 (1972): "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." The unconstitutional holding in *Roundhouse* resulted in the present enactment of C.G.S. § 49-35a and C.G.S. § 49-51(a), which courts also have viewed as creating two conflicting lien discharge statutes.

In 1994 Connecticut's Law Revision Commission determined that under recent Due Process decisions of the U.S. Supreme Court the imposition of a mechanic's lien constitutes a taking of property for constitutional purposes. On February 8, 1995 the Commission reported to the General Assembly and to its Judiciary Committee that:

> Where such a taking has taken place, the owner of the encumbered property is constitutionally entitled to a prompt hearing to determine that probable cause exists to uphold the lien. The failure of the current law to provide a right to a prompt hearing within a specified period, with adequate notice of rights, therefore constitutes a defect in due process procedures.

In the business world of the 1990's an invalid lien means that a bank cannot package a mortgage and sell it in the secondary market. A property with a mechanic's lien is akin to a property with an environmental hazard. A financing bank often holds the majority interest in a property and will not accept a bond in substitution for a lien. An invalid lien can foreclose financing opportunities. Insurers and employers also look at resulting credit histories. For these reasons the granting of this Petition for Certification could render important guidance of broad public interest. The Supreme Court, respectfully, is urged to grant this Petition.

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The defendants' petition for certification for appeal from the Appellate Court, 46 Conn. App. 63 (AC 15996), is denied.





*Robert J. Galiette*, in support of the petition.

*Gregory M. Harris*, in opposition.

Decided September 24, 1997